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Public Prosecutor v Sld 15772 Hj Redzuan bin Kifli @ Hj Halimen bin Kifli

HIGH COURT (BRUNEI DARUSSALAM) — CRIMINAL TRIAL NO 19 OF 2009
STEVEN CHONG J
11 NOVEMBER 2010

Criminal Law — Rape — Girl below statutory age of consent — Victim under 14 years of age — Essential ingredient of charge — Whether established — Whether prosecution established case beyond reasonable doubt — Penal Code ss 375 & 376

Evidence — Corroboration — Rape — Statutory rape — Victim under 14 years of age — Evidence of victim — Factual inconsistencies and inaccuracies — Whether victim's evidence inherently flawed — Whether could be relied upon as basis for conviction — Whether victim's evidence corroborated by other prosecution witnesses — Whether evidence tendered sufficient to establish rape beyond reasonable doubt

The defendant was charged with the rape of a 13 year old girl (Ms X), a secondary school student, contrary to s 376(2) of the Penal Code. The defendant got to know Ms X through MSN chat. On the day of the incident, as they were chatting, the defendant asked the victim if he could see her and she gave him her house address and told him that she was at home alone. According to the victim, she gave her address to him thinking that he would not be able to find her house. When the defendant arrived at the main door uninvited, she tried to close the door upon seeing him, however, he managed to push the door open. Upon gaining entry into the house, the defendant pulled her into the living room. The victim tried to push him away but failed because he was 'so strong'. In the course of the alleged rape, the victim was punched and slapped by the defendant. After sexual intercourse, the defendant coerced her to perform fellatio and that after the defendant had ejaculated he threatened to kill her if she told anyone about the incident. After the defendant had left the house she went to the bathroom to wash her face and then cleaned the floor and sofa where the defendant had ejaculated. She then ran to her stepmother's house next door and told her and Tiqah that she had been raped. Ms X's mother was informed of the incident who then lodged a police report. The defendant in his evidence however, stated inter alia, that he tried to have sexual intercourse with Ms X but did not penetrate her; that he did not force Ms X to perform fellatio but she volunteered to perform it; that he 'just pushed' her on the stomach; and that he did not threaten to kill her if she disclosed to anyone what had happened. The medical report stated that the lax hymen of Ms X could be congenital or due to sexual intercourse and the small abrasion on her labia

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minora could be caused by the insertion of any hard object including a penis or finger. The defendant admitted he had inserted his finger in Ms X's vagina. The presence of semen on Ms X's panties with DNA matching the defendant's DNA provides evidence that he had ejaculated which was not denied by him. The court had to determine whether the prosecution had established each essential element of the charge beyond reasonable doubt. The case for the prosecution hinged upon the evidence of Ms X who said she was raped by the defendant as alleged in the charge. There was no independent corroborative evidence. The medical evidence was neutral.

Held, convicting the accused as per the charge:

(1) Ms X was consistent throughout her testimony that the defendant had raped her. She gave cogent and unequivocal evidence that the defendant had sexual intercourse with her without her consent. Although there are inconsistencies and discrepancies between her evidence and her police statement concerning several issues such as the manner in which the defendant had opened the door when he arrived at her house and the sequence in which the rape and fellatio had occurred, they are not serious and do not affect the veracity and accuracy of Ms X's evidence on the material issue, in particular that she was raped by the defendant in the manner she described. In relation to the discrepancies between Ms X's evidence and her police statement, this court accepts her explanation that she was 'traumatised' and could not 'think straight' at the time she gave her statement to the police (see paras 59–63).

(2) Ms X's conduct after the incident was entirely consistent with that of a girl who had just been raped. The witnesses' evidence showed that, immediately after the incident, Ms X was crying and appeared panic and traumatised. From the evidence it was clear that Ms X was in a state of distress after the incident (see paras 71–72).

(3) The defendant, on the other hand, was inconsistent in his evidence on a number of issues. This court was satisfied that the defendant went to Ms X's house with the intention of having sexual intercourse with her and that he did have sexual intercourse with her without her consent (see paras 79–80).

(4) There are also several discrepancies between the defendant's evidence and his police statements. For instance, the defendant said he only inserted his finger into Ms X's vagina. But there was no mention of this in his police statements. The court did not find his explanation plausible, that he failed to mention this in his ordinary statement because he was 'in a panic and scared'. He had no difficulty giving a detailed account of what transpired in Ms X's house that afternoon in his ordinary statement. In

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the courts opinion he did not mention this act in his police statements because it never occurred at the time and not because he was 'in a panic and scared' (see para 82).

[Bahasa Malaysia summary

Defendan dituduh dengan kesalahan merogol seorang gadis berumur 13 tahun (Cik X), seorang pelajar sekolah menengah, di bawah s 376(2) Kanun Keseksaan. Defendan mengenali Cik X melalui perbualan MSN. Pada hari kejadian, semasa mereka sedang berbual, defendan bertanya kepada mangsa sama ada mereka boleh berjumpa dan dia memberikan alamat rumahnya kepada defendan dan memberitahunya bahawa dia berseorangan di rumah. Menurut mangsa, dia memberikan alamat rumahnya dengan andaian bahawa defendan tidak akan dapat menjumpai rumahnya. Apabila defendan tiba di pintu hadapan rumah tanpa dijemput, mangsa cuba menutup pintu selepas melihat defendan, tetapi, dia berjaya menolak pintu itu hingga terbuka. Selepas berjaya masuk ke dalam rumah tersebut, defendan menariknya ke ruang tamu. Mangsa cuba menolaknya tetapi gagal kerana dia 'amat kuat'. Semasa kejadian rogol yang didakwa, mangsa ditumbuk dan disepak oleh defendan. Selepas persetubuhan, defendan memaksa mangsa untuk melakukan felatio dan bahawa selepas defendan mengeluarkan air maninya dia mengugut untuk membunuhnya jika mangsa memberitahu sesiapa mengenai kejadian tersebut. Selepas defendan meninggalkan rumah, mangsa pergi ke bilik air untuk mencuci mukanya dan kemudian membersihkan lantai dan sofa di mana defendan telah mengeluarkan air maninya. Dia kemudian bergegas ke rumah ibu tirinya di sebelah dan memberitahunya dan Tiqah bahawa dia telah dirogol. Ibu Cik X diberitahu mengenai kejadian tersebut yang kemudiannya membuat laporan polis. Defendan di dalam keterangannya, walau bagaimanapun, menyatakan, antara lain, bahawa dia mencuba untuk melakukan hubungan seks dengan Cik X tetapi tidak memasukkan kemaluannya; bahawa dia tidak memaksa Cik X untuk melakukan felatio tetapi dia sukarela untuk melakukannya; bahawa dia 'just pushed' mangsa di bahagian perutnya; dan dia tidak mengugut untuk membunuhnya jika dia mendedahkan kepada sesiapa apa yang berlaku. Laporan perubatan menyatakan bahawa selaput dara Cik X mungkin kongenital disebabkan oleh hubungan seks dan penggeseran kecil pada labia minoranya mungkin disebabkan oleh pemasukan benda keras termasuk kemaluan atau jari. Defendan mengakui bahawa dia memasukkan jarinya ke dalam faraj Cik X. Kehadiran air mani pada seluar dalam Cik X dengan DNA yang berpadanan dengan DNA defendan memberikan keterangan bahawa dia telah mengeluarkan air maninya yang tidak dinafikan olehnya. Mahkamah perlu menentukan sama ada pihak pendakwaan telah membuktikan setiap elemen penting pertuduhan melampaui keraguan yang munasabah. Kes untuk pihak pendakwaan bergantung kepada keterangan Cik X yang menyatakan bahawa

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dia telah dirogol oleh defendan di dalam pertuduhan yang didakwa. Tidak terdapat keterangan sokongan bebas. Keterangan perubatan adalah neutral. A

Diputuskan, mensabitkan tertuduh seperti yang dituduh:

(1) Cik X konsisten sepanjang keterangannya bahawa defendan telah merogolnya. Dia memberikan keterangan yang meyakinkan dan jelas bahawa defendan melakukan hubungan seks dengannya tanpa persetujuannya. Walaupun tidak konsisten dan terdapat percanggahan di antara keterangannya dengan keterangan polisnya berkaitan dengan beberapa isu seperti cara di mana defendan telah membuka pintu apabila dia tiba di rumah mangsa dan urutan di mana rogol dan felatio telah berlaku, ia tidak serius dan tidak memberi kesan kepada kesahihan dan ketepatan keterangan Cik X dalam isu material, khususnya bahawa dia telah dirogol oleh defendan dalam cara yang mana dia nyatakan. Berkaitan dengan percanggahan di antara keterangan Cik X dan keterangannya kepada polis, mahkamah ini menerima penjelasannya bahawa dia telah 'traumatised' dan tidak boleh 'think straight' pada masa dia memberikan keterangan kepada polis (lihat perenggan 59–63). B C D

(2) Tindakan Cik X selepas kejadian tersebut adalah keseluruhannya konsisten dengan seorang budak yang baru dirogol. Keterangan saksi-saksi menunjukkan bahawa, sejurus selepas insiden tersebut, Cik X menangis dan kelihatan panik dan dalam keadaan trauma. Daripada keterangan jelas bahawa Cik X berada dalam keadaan cemas selepas insiden tersebut (lihat perenggan 71–72). E F

(3) Defendan pula sebaliknya, tidak konsisten di dalam keterangannya dalam beberapa isu. Mahkamah ini berpuas hati bahawa defendan telah pergi ke rumah Cik X dengan niat untuk melakukan seks dengannya dan dia telah melakukan seks dengan mangsa tanpa persetujuannya (lihat perenggan 79–80). G

(4) Terdapat juga beberapa percanggahan di antara keterangan defendan dan kenyataan polisnya. Sebagai contoh, defendan menyatakan dia hanya memasukkan jarinya ke dalam vagina Cik X. Tetapi tidak dinyatakan mengenai perkara ini di dalam kenyataan polisnya. Mahkamah mendapati penjelasan ini tidak munasabah, bahawa dia gagal untuk menyatakan perkara ini di dalam kenyataan biasanya kerana dia dalam keadaan 'in a panic and scared'. Dia tidak mempunyai masalah dalam memberikan butiran terperinci apa yang berlaku di rumah Cik X tengahari tersebut di dalam kenyataan biasanya. Mahkamah berpendapat dia tidak memberitahu tindakan ini di dalam kenyataan polisnya bukan kerana dia berada di dalam keadaan 'in a panic and scared' tetapi kerana tindakan itu tidak berlaku pada masa tersebut (lihat perenggan 82).] H I

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Notes

For a case on girl below statutory age of consent, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) para 3213.

For cases on rape, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1145–1157.

Legislation referred to

Evidence Act s 157
Criminal Procedure Code ss 117(3), 117B
Penal Code ss 375, 376(2)

Samiyyah Emeralda (Abas POKLS DSLJ, Dk Hana Molina Pg Mohammad and Deputy Public Prosecutor with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Zul-Sukarla bin Zul-Kiflie (Zul-Sukarla Zul-Kiflie Law Office) for the defendant.

Steven Chong J:

[1] The defendant is charged with the rape of a 13 year old girl (Ms X) contrary to s 376(2) of the Penal Code.

PROSECUTION CASE

[2] Ms X was 13 years old at the time of the alleged rape and a secondary school student. As the evidence of Ms X forms the cornerstone of the prosecution case against the defendant I shall set out her evidence in her statement made under s 117B of the Criminal Procedure Code ('s 117B statement') ('P6') verbatim (save that any particulars which would lead to the identity of Ms X will be omitted) and it is as follows:

(1) I am currently attending school and I am 14 years old (Date of birth: 16th October 1995).

(2) On 21st May 2009, I attended school. My father picked me up when school had ended and brought me home. I stayed home in the afternoon and was alone. My mother was teaching and my father was out sending my siblings off to tuition class and also to work.

(3) At about 1330 hours, I was using MSN to chat with 'Arman', whom I had known for about a week, but I only met him on the day of the incident. When I was using MSN chat, I used the name 'QYLL'.

(4) When I was chatting with 'Arman', we were just chatting about general things and he asked me if he could see me and I gave him my house address. When we were chatting, I also told him that I was at home alone and I gave him my address thinking that he would not be able to find my house.

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(5) He told me that he wanted to go to my house but I did not allow him to come over as I was scared of my father, who had asked me not to invite anyone over when he is not around.

(6) At about 1430 hours, I was in the living room watching television when I heard a rough knock on the door and I opened it, thinking it was my father but I saw the defendant instead.

(7) I tried to close the door but he managed to push the door open and I was immediately pushed to the floor. The defendant came inside the house and pulled me by the hands to the pink sofa in the living room.

(8) I tried to push him away but he was so strong that I was unable to do so. During the struggle, I fell down to the floor and he tried to pull down my pants but I managed to pull it back up.

(9) I then tried to run away but he caught up with me and pulled me again by the hands and pushed me to the black sofa in the living room. There was another struggle and I was crying and calling out for help. He then tried to pull down my pants and was successful this time. At this point, he had pulled down my pants and my underwear. When I was sitting on the sofa, he punched me on my left arm, chest and stomach using his right hand and he also slapped me once on the left side of my face using his left hand.

(10) I tried to push him away but could not do so. As I was crying, he pulled up both my legs and put it on his shoulders. He held both my legs with his hands and he leaned forward and pulled his shorts to the side and took his penis out.

(11) I told him not to do anything but he then proceeded to have sexual intercourse with me and I did not consent to sexual intercourse. Whilst he was having sexual intercourse with me, he told me that it would not take long, it would not hurt and that he would not impregnate me. He had sexual intercourse with me for about 5 minutes.

(12) After he had sexual intercourse with me, he asked me to suck his penis but I refused. He insisted and forced me to open my mouth and inserted his penis inside my mouth.

(13) I was weak and was crying at the time and the defendant then ejaculated on my face, blouse, sofa and also on the floor. After that, he pulled his shorts back down and threatened me not to tell anyone about the incident or else he would kill me. He then left my house.

(14) After he left, I went to the bathroom to wash my face and took a small towel and wiped the defendant's semen off the floor and sofa and ran towards my stepmother's house, which is located next to my house.

(15) When I reached the house, I saw my stepmother and Tiqah inside the house. I was still crying and called out my stepmother's name. My stepmother then asked me why I was crying and I told her not tell my mother about this as she would hate me. My stepmother said that there would be no reason for my mother to hate me and she told Tiqah to call my mother immediately. I told Tiqah about what had happened to me and she made a phone call to my mother.

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(16) I felt afraid, traumatized and embarrassed after what had happened and thought that my family would not love me anymore.

(17) Not long after that, my mother arrived and I met her outside my stepmother's house. At that time I was still with my stepmother and Tiqah. My mother immediately comforted me and asked me what had happened. She also told Tiqah to call the police.

(18) Tiqah called the Muara police station and lodged a complaint and my mother brought me inside the house. When we were inside the house, my mother asked me what had happened.

(19) Not long after, the police then came over to our house and asked us to go to the police station. When we arrived at Muara police station, they asked us to go to Ong Sum Ping for our statements to be recorded and on 22nd May 2009 at about 0105 hours, I was brought to RIPAS Hospital for a medical examination.

(20) When I was at RIPAS Hospital, I was medically examined by a doctor.

(21) On 2nd June 2009, I was asked to go to Central Police Station, Bandar Seri Begawan to attend an identification parade to identify the accused and when I was there, they explained the procedure to me. I understood the procedure that was explained to me and when I was inside the room, I positively identified that 'Arman' was one of the men who were in the identification parade and I then picked him.

[3] In court Ms X said in evidence-in-chief that the defendant asked for her age and she told him she was 13 during a 'chat'.

[4] Ms X gave conflicting evidence as to the number of police statements she made after the alleged rape. Under cross-examination she at first said she made two police statements, one on the afternoon of 21 May 2009 at Muara Police Station and the other on 23 May 2009 at the Women and Children Protection Unit ('the Unit') at Ong Sum Ping ('the OSP police statement'). Then, still under cross-examination, Ms X said she did not make any statement at Muara Police Station on 21 May 2009 and the only police statement she gave was the OSP police statement.

[5] However, in re-examination, Ms X reverted to her original position, viz, she made two police statements.

[6] It was not disputed that Ms X gave a written statement to 'W/Cpl 3230' at Muara Police Station on 21 May 2009 at 4.15pm but it has 'gone missing'. L/Cpl 2890 Yunos bin Hj Besar ('L/Cpl Yunos') gave evidence that he received the statement from 'W/Cpl 3230' that afternoon; he put it in the 'investigation file' ('the file') but was 'not sure if it was in the file when this was handed to the Unit'.

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[7] S/Sgt 2000 Sepiah bte Hj Dambong said she received the file from L/Cpl Yunos on the same afternoon but she did not see Ms X's statement in the file.

[8] Ms X agreed in cross-examination that in her evidence in her s 117B statement ('para 7') she said the defendant had pushed the door open but in the OSP police statement (in answer to question 16) she said the defendant had kicked the door open.

[9] She explained that she was 'traumatised' at the time she made the OSP police statement and could not 'think straight'. She said her s 117B statement was correct: the defendant had pushed the door open.

[10] Ms X also agreed in cross-examination to the following matters: that in her s 117B statement ('para 12') she said the defendant put his penis in her mouth after he had sexual intercourse with her but in the OSP police statement (in answer to question 22) she said the defendant inserted his penis in her mouth first and after that he raped her; and that if the defendant had used his left hand to slap her face, he would have slapped the right side of her face and not the left side as she claimed in her s 117B statement ('para 9').

[11] She disagreed that she had given her address to the defendant hoping he would visit her, that she willingly sucked the defendant's penis to avoid sexual intercourse with him and when he ejaculated she spat his semen on the floor and sofa, and that the defendant did not insert his penis in her vagina.

[12] Ms X said she did not bite the defendant's penis because it was 'disgusting' and she 'did not know what to do'.

COMPLAINTS

[13] Ms X's stepmother gave evidence that she and Tiqah (her daughter's friend) were at home watching television when Ms X came calling for her. Ms X was crying and she looked pale and her hair was untidy. She asked Ms X why she was crying. Ms X said: 'Don't tell my mother or else she will hate me.' She told Tiqah to phone Ms X's mother.

[14] Shortly after that Ms X's mother arrived and took Ms X back to their house.

[15] Tiqah also said that Ms X was crying when she turned up at her stepmother's house. She added that Ms X who was holding a yellow face towel in her hand, was 'untidy', looked sad and appeared to be in a 'panic'.

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[16] She said Ms X told her she had been raped by a man whom she knew through 'mobile chatting'. She phoned Ms X's mother who came and took Ms X back to their home. She also phoned the police and said 'someone had been raped' and gave the home address of Ms X.

[17] In cross-examination she said she saw Ms X throw the yellow face towel on the floor. And that Ms X said she had used the yellow face towel to wipe 'traces of something wet' from the sofa.

[18] Ms X's mother is a religious school teacher. She recounted that Ms X was crying and seemed to be 'traumatised' when she saw her. She asked Ms X what had happened but she did not answer. She said Ms X was still crying 'uncontrollably' when she took her home.

[19] At home she asked Ms X what had occurred again. After Ms X had calmed down she said that a man had done 'something' to her; that he managed to rape her; that she did not know him; that he entered the house when she opened the door after hearing a loud knock and thought it was her father; that when she tried to prevent him from entering he pushed her; that she had shouted but no one heard her; and that he had used force and 'put his hand' on her stomach.

MEDICAL EVIDENCE

[20] Dr Ohn Htwe, a specialist obstetrician and gynaecologist at RIPAS Hospital examined Ms X on the morning of 22 May 2009. She found that Ms X's hymen was lax and there was a small abrasion on her labia minora.

[21] The lax hymen could be congenital or due to sexual intercourse.

[22] As to the small abrasion this was caused within three days. It could have been caused by the insertion of any hard object into the vagina including an erect penis or a finger.

[23] Swabs taken from Ms X's vagina were tested and found to be negative for spermatozoa, prostrate specific antigen and gonococci.

DNA EVIDENCE

[24] Mr Paul Liew Vun Oon is a scientific officer in the Department of Scientific Services. Mr Liew's evidence in his s 117B statement ('P14') is as follows:

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On the 17th day of June, 2009 at 15.35 hours, my lab received from SGT 2000 HJH SEPIAH DAMBONG, one memorandum letter and seven exhibits. The memorandum letter dated 16th June 2009 undersigned by CH/INSP HALIMAH HJ NAY AN was a memorandum letter requesting for 'blood screening and spermatozoa'.

The exhibits in the brown envelopes sealed 'BIOHAZARD' and initialed on both ends are as follows:

(1) One brown RBPF envelope, sealed 'BIOHAZARD', marked 'EXHIBIT NO A' and signed which contained two white swab boxes both sealed 'BIOHAZARD', signed and marked as follows:

(i) 'Control Sample A' - containing one unstained single-tipped cotton swab,

(ii) 'Swab A'- containing one unstained single-tipped cotton swab.

The two swabs tested negative for both Kastle Meyer (KM), presumptive test for blood and Acid Phosphatase (AP), presumptive test for seminal fluids.

(2) One brown RBPF envelope, sealed 'BIOHAZARD', marked 'EXHIBIT NO. B' and signed which contained two white swab boxes both sealed 'BIOHAZARD', sighed and marked as follows:

(i) 'Control Sample B' - containing one unstained single-tipped cotton swab,

(ii) 'Swab B' - containing one unstained single-tipped cotton swab.

The two swabs tested negative for both Kastle Meyer ('KM'), presumptive test for blood and Acid Phosphatase ('AP'), presumptive test for seminal fluids.

(3) One brown RBPF envelope, sealed 'BIOHAZARD', marked 'EXHIBIT NO C' and signed which contained two white swab boxes both sealed 'BIOHAZARD', signed and marked as follows:

(i) 'Control Sample C' - containing one unstained single-tipped cotton swab,

(ii) 'Swab C' - containing one unstained single-tipped cotton swab.

The two swabs tested negative for both Kastle Meyer (KM), presumptive test for blood and Acid Phosphatase (AP), presumptive test for seminal fluids.

(4) One brown RBPF envelope, sealed 'EVIDENCE', marked 'EXHIBIT NO El' and signed which contained one black colour short sleeve t-shirt wrapped in a piece of brown paper and folded.

Both the inside and outside front and back of the t-shirt tested negative for both Kastle Meyer (KM), presumptive test for blood and Acid Phosphatase (AP), presumptive test for seminal fluids.

(5) One brown RBPF envelope, sealed 'EVIDENCE', marked 'EXHIBIT NO E2' and signed which contained one pair of black colour shorts wrapped in a piece of brown paper and folded.

Both the inside and outside front and back of the shorts tested negative for both Kastle Meyer (KM), presumptive test for blood and Acid Phosphatase (AP), presumptive test for seminal fluids. No hair was recovered.

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(6) One brown RBPF envelope, sealed 'EVIDENCE', marked 'EXHIBIT NO E3' and signed which contained one pink colour panty wrapped in a piece of brown paper and folded.

Both the inside front and back of the panty tested negative for Kastle Meyer (KM), presumptive test for blood. However, these areas tested positive for Acid Phosphatase (AP), presumptive test for seminal fluids, ABAcard P30, the confirmatory test for semen as well as for spermatozoa microscopic examination.

The DNA profile was obtained by amplification of DNA extracted from the positive areas above.

(7) One brown RBPF envelope, sealed 'EVIDENCE', marked 'EXHIBIT NO E4' and signed which contained one white and pale yellow colour face towel wrapped in a piece of brown paper and folded.

Both front and back of the face towel tested negative for Kastle Meyer (KM), presumptive test for blood. The front of the face towel tested positive for Acid Phosphatase (AP), presumptive test for seminal fluids and ABAcard P30, the confirmatory test for semen.

No DNA profile was obtained due to insufficient samples.

On the 23 June 2009 at 9.45 hours, SGT 2000 HJH SEPIAH DAMBONG submitted to the Forensic Biology/DNA laboratory two envelopes consisting the following:

(1) One brown government envelope, sealed 'BIOHAZARD', signed and marked '... Ms X, BARCODE NUMBER: 01-080395'. The deoxyribonucleic acid ('DNA') profile was obtained by amplification of DNA extracted from the blood specimen.

(2) 2. One brown government envelope, sealed 'BIOHAZARD', signed and marked '... HAJI REDZUAN BIN KIFLI, BARCODE NUMBER: 00-298828' which contained one reference blood sample marked 'Malay'. The deoxyribonucleic acid (DNA) profile was obtained by amplification of DNA extracted from the blood specimen.

Additionally, copies of the suspect/witness body samples referral form for the FTA samples was also submitted.

Conclusions: the DNA profile extracted from the sample area taken from 'Exhibit No E3' (panty, sperm fraction), was found to match the DNA profile of blood specimen marked 'Malay' (HAJI REDZUAN BIN KIFLl, 00-298828) at genetic loci D8S1179, CSF1PO, THO1, D16S539, D2S1338, D19S433, vWA, TPOX, Amelognin, and D5S818. The probability of another person, selected at random from the Malay population, having the matching DNA profile, is estimated to be 23 trillion (2.3 x 1013).

The DNA profiles derived from the sample area taken from 'Exhibit No E3 (panty, epithelial fraction) were found to be a mixed DNA profile. The DNA profiles of both the blood specimens marked 'Malay' (HAJI REDZUAN BIN KIFLl, 00-298828) and '01-080395' (MS X) can be concluded as the contributors, of the mixed DNA profile. The proportion of the population whose individual DNA profiles can be included as contributors of the mixed profile is 1.1 x 1013

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I then produced a report of the forensic examination in connection with case no MR/CR/144/2009 on 1st December 2009. On the 19th January 2010 '11.14 hrs, the said report was collected by SGT '2000 HJH SEPIAH DAMBONG, Royal Brunei Police Force, Brunei Darussalam.

[25] Mr Liew further said in court that in most cases any washing of an article of clothing which had been stained by semen, with or without detergent, would produce a negative result for the presence of semen which is 'very water soluble'.

[26] He said that if semen was wiped off a sofa with a wet cloth it would be difficult to detect semen. But if the semen was wiped off with a dry cloth the possibility of detection of traces would depend on the amount deposited, how clean the sofa was wiped and the type of sofa surface.

ARREST

[27] The defendant was arrested by the police with the assistance of army personnel on the night of 21 May 2009 at the house of his second wife. There was evidence from several witnesses (L/Cpl 4256 Hj Jefri bin Hj Jumat @ Suhaili, Sgt 2118 Suhaimi bin Hj Bujang, W02 Ali bin Mohd Said and Cpl 13266 Royazmi bin Hj Matali) that the defendant had attempted to escape when they arrived at his house but he surrendered after he fell and injured himself.

IDENTIFICATION PARADE

[28] Insp Md Adi Hamree bin Hj Rakawi ('Insp Hamree') conducted an identification parade on the morning of 2 June 2009 at the Central Police Station. Ms X picked the defendant out from a line up of eight men and said to Insp Hamree that the defendant had raped her in her house on the afternoon of 21 May 2009.

ORDINARY STATEMENT

[29] On the morning of 23 May 2009 an ordinary statement was recorded from the defendant by Insp Hjh Nikmah binti Hj Maidin ('Insp Hjh Nikmah') at the Unit. In this statement, which is in question and answer form, the defendant said he got to know Ms X through 'MSN chatting' and went to her house on the afternoon of 21 May 2009, she opened the door after he knocked and they 'chit-chatted' outside; and he 'pushed her chest' to gain entry into the house when she refused to give him a glass of water.

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[30] The defendant continued: 'When we got to the living room close to the sofa I pushed the girl's body to sit but the girl did not want to listen to my request (and) she retaliated and scratched me on my right arm, after that I punched her stomach (and) then I managed to take off her trousers and tried to insert my private part into the girl's private part but I did not get to insert my private part into the girl's private part. Because I could not insert my private part into the girl's private part I only managed to rub my private part outside the girl's private part, at that time my private part erected and I then massaged my private part about 2 or 3 minutes until I ejaculated, my semen got onto her shirt, hair and on the floor.'

[31] Upon being asked whether he did anything else to Ms X the defendant said that before he ejaculated Ms X 'wanted' to perform fellatio and 'asked' to do it as she 'did not agree to having sexual intercourse'.

[32] To the next question as to whether he had 'forced' Ms X to perform fellatio (Question No 16) the defendant answered:

> Yes I forced.

[33] And to the penultimate question as to whether he wanted to add anything to his statement, the defendant said he regretted and apologized for his 'wrongdoing to that girl' and realized he had 'responsibilities' for his 'two wives and many children'.

[34] There was evidence from Insp Hjh Nikmah that the defendant did not sign the declaration at the end of the statement because he was 'very remorseful and was crying and sad thinking of his family' at the time.

SECTION 117(3) STATEMENT

[35] A 'Notice of Warning Statement' under s 117(3) of the Criminal Procedure Code was also recorded from the defendant on the afternoon of 25 May 2009.

[36] Two charges are set out in the s 117(3) statement: first, that the defendant raped Ms X in her house on 21 May 2009; and second, that he used criminal force to outrage the modesty of a woman (Ms Y) on 6 March 2009.

[37] The second charge is, of course, irrelevant to the prosecution case against the defendant.

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[38] In this statement the defendant said that in relation to the rape charge he 'did not successfully do it, that is inserting my private into the girl's private part; I was only rubbing my private part outside the woman's private part'.

[39] The defendant further said that 'this matter would not have happened' if Ms X had not invited him to visit her and informed him that her parents would not be at home.

DEFENCE CASE

[40] The defendant gave evidence that he got to know Ms X on MSN chat. She gave her house address to him and invited him to visit her on 21 May 2009 because she would be alone.

[41] He recounted that he went to Ms X's house that day and knocked at the door 'softly' upon arrival. When Ms X opened the door he introduced himself as Arman which was the name he used on MSN chat. He pushed her 'gently and softly' into the house because he was 'scared other people might see'. She did not fall down on the floor.

[42] Inside the house the defendant said he tried to kiss Ms X on the lips but she avoided it. He also tried to fondle her breasts but she pushed his hand away. He 'pushed her on the stomach' and she fell onto the sofa. He immediately got on top of her and 'hugged' her. He tried to pull down her pants but she tried to push him away. They struggled and after he made a few attempts she 'gave up' and 'let me pull down her pants'. He then took his penis out. Ms X kept her thighs closed. He inserted his finger into her vagina and it was 'kind of wet'. He was on top of her and he 'rubbed' his penis on her inner thighs.

[43] The defendant went on to say: 'When I rubbed my penis on her inner thighs I tried to have sexual intercourse with her but she did not want to. She told me she did not want to. After a few attempts she said she was willing to suck my penis on condition that I would not force her to have sexual intercourse.'

[44] It was the defendant's evidence that his penis did not penetrate Ms X's vagina and he did not force Ms X to perform fellatio. He said he ejaculated on her body and the floor after she sucked his penis. He agreed that in his ordinary statement, when asked whether he had 'forced' Ms X to perform fellatio ('Question No 16'), he had answered: 'Yes I forced.' This was not true.

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[45] The defendant said he did not punch Ms X's stomach although he had admitted doing so in his ordinary statement. He said he 'just pushed her on the stomach'. And he did not threaten to kill her if she told anyone about the incident.

[46] He said Ms X had cried because he tried to force her to have sexual intercourse. She did not cry when she sucked his penis. To a question from his counsel as to when Ms X had cried the defendant answered: 'After I ejaculated.'

[47] In cross-examination the defendant said the purpose of his visit to Ms X's house was because he wanted to 'meet' her.

[48] He said he did not mention that he had inserted his finger into Ms X's vagina in his ordinary statement because he was 'in a panic and scared'.

[49] As to his answer to question No 16 in his ordinary statement, the defendant said he did not say he 'forced' Ms X to perform fellatio but that he had 'asked' her. It was possible that Insp Hjh Nikmah herself had used the word 'forced'.

[50] The defendant at first agreed that prior to the recording of his ordinary statement Insp Hjh Nikmah had asked him to read the declaration at the end of the statement. But when asked whether he read the declaration he said he was not asked to read the declaration.

[51] Again, the defendant at first said he read the declaration after he had read the contents of his ordinary statement and signing at the end of each of his answers but later on asserted that he did not read the declaration.

THE LAW

[52] At the close of the case it is the duty of the court to review all the evidence in its totality to see whether the prosecution has established each essential element of the charge beyond reasonable doubt before there can be a conviction.

[53] So far as it is relevant s 375 of the Penal Code provides that a man is said to commit rape when he has sexual intercourse with a woman with or without her consent when she is under 14 years of age.

ASSESSMENT OF THE EVIDENCE

[54] The case for the prosecution hinged upon the evidence of Ms X who

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said she was raped by the defendant as alleged in the charge. There is no independent corroborative evidence. The medical evidence is neutral. So too, the DNA evidence.

[55] The lax hymen of Ms X could be congenital or due to sexual intercourse and the small abrasion on her labia minora could be caused by the insertion of any hard object including a penis or finger. The defendant admitted he had inserted his finger in Ms X's vagina. The presence of semen on Ms X's panties with DNA matching the defendant's DNA provides evidence that he had ejaculated which is not denied by him.

[56] Whilst s 157 of the Evidence Act has the effect of elevating the recent complaints made by a rape victim from showing consistency of conduct to corroboration, common sense dictates that this form of corroboration cannot be equated with corroboration by independent evidence.

[57] That said, the court may accept the evidence of a rape victim even without any corroboration if convinced she is telling the truth and her testimony is reliable. But it is crucial to examine the veracity and reliability of such uncorroborated evidence with great care before relying on it.

[58] Having seen and heard Ms X testify, and evaluated her testimony together with the evidence in totality (including from the defendant), I have no hesitation in accepting her as a credible witness and that her account of what happened in her house on the afternoon of 21 May 2009 when the defendant arrived is truthful and accurate in essential details.

[59] Ms X was consistent throughout her testimony that the defendant had raped her. She gave cogent and unequivocal evidence that the defendant had sexual intercourse with her without her consent. She clearly understood that sexual intercourse involved the penetration of the vagina by the penis.

[60] In a lengthy and intensive cross-examination Ms X was unshaken and she maintained the material parts of her evidence-in-chief.

[61] There are certainly inconsistencies in the evidence of Ms X such as the number of police statements she made. There are also discrepancies between her evidence and her police statement concerning several issues such as the manner in which the defendant had opened the door when he arrived at her house and the sequence in which the rape and fellatio had occurred.

[62] Counsel on behalf of the defendant also placed significance on the 'clear inconsistency' between Ms X's evidence-in-chief that the defendant had

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ejaculated on her face and her evidence under cross-examination that she had covered her face with her hands when the defendant ejaculated.

[63] In my opinion the inconsistencies and discrepancies such as the ones mentioned above are not serious and do not affect the veracity and accuracy of Ms X's evidence on the material issue, in particular that she was raped by the defendant in the manner she described. In relation to the discrepancies between Ms X's evidence and her police statement, I accept her explanation that she was 'traumatised' and could not 'think straight' at the time she gave her statement to the police.

[64] It is convenient at this juncture to discuss the submissions of counsel for the defendant regarding the 'other flaws' in the 'prosecution evidence'. First, it is argued that since Ms X's written statement made at Muara Police Station is 'missing' the court has no opportunity to compare the contents of this statement to her evidence and evaluate her evidence 'properly'.

[65] I agree that the court has missed the opportunity to evaluate Ms X's evidence taking into account her 'missing' statement made at Muara Police Station. But it is not suggested that there was a deliberate concealment of evidence by the police. The fact that this statement has 'gone missing' is a reflection of the calibre of the police officer or police officers responsible for this unfortunate episode.

[66] I disagree that the court has been deprived of the benefit of evaluating Ms X's evidence 'properly' in the absence of this 'missing' statement. Notwithstanding this 'missing' statement the court was able to assess the veracity and accuracy of Ms X's evidence fully and conclusively on the totality of the evidence adduced.

[67] Next, it was contended that there was no report of any injuries suffered by Ms X to support her evidence that she had been punched and slapped by the defendant in the course of the alleged rape. There was also no evidence of any injury on her buttocks although she claimed she was 'pushed to the floor' when the defendant pushed the door open and she 'fell down to the floor' during the struggle with him.

[68] I accept that the medical report states that there was no 'external injury' on Ms X except for a small abrasion on her labia minora. But then, not every punch or slap, or fall will cause injury, or result in visible sign of injury.

[69] Finally, it was the contention of counsel on behalf of the defendant that (a) no 'swab' was taken and no 'thorough medical examination' was carried out

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in relation to the defendant's penis to prove that 'it has really penetrated Ms X's vagina' and (b) there 'seem to be no evidence being collected to support or refute' Ms X's allegation of rape.

[70] Concerning contention (a) the usefulness of such an exercise is questionable and it would be wrong to speculate whether evidence of this nature, if available, would prove or disprove penetration in this case. As to contention (b) contrary to counsel's submission, the police did collect evidence connected with the rape, for example, the clothes worn by Ms X at the material time, for DNA analysis.

[71] Ms X's conduct after the incident was entirely consistent with that of a girl who had just been raped. After the defendant had left the house she went to the bathroom to wash her face and then cleaned the floor and sofa where the defendant had ejaculated. She then ran to her stepmother's house next door and told Tiqah that she had been raped.

[72] All three witnesses, ie, Ms X's mother, stepmother and Tiqah said that Ms X was crying when they saw her. Tiqah said Ms X appeared to be in a 'panic' while Ms X's mother said Ms X seemed to be 'traumatised'. Their evidence demonstrates that Ms X was in a state of distress after the incident.

[73] Ms X struck me as a somewhat naive young girl. It was, of course, imprudent of her to tell the defendant where she lived and that she was alone that afternoon but she naively believed he would not be able to find her house. Moreover, she had told him not to visit her.

[74] In summary, I believe and accept Ms X's evidence that at the material time she was home alone when the defendant arrived at the main door uninvited; that when she tried to close the door upon seeing him, he managed to push the door open and she was pushed to the floor; that upon gaining entry into the house he pulled her into the living room; that she tried to push him away but failed because he was 'so strong'; that during the struggle she fell down to the floor; that he tried to pull down her pants but she pulled it back; that when she tried to run away he caught her and pushed her to the black sofa; that she cried and called for help; that he eventually succeeded in pulling down her pants and panties; that he punched and slapped her; that he had sexual intercourse with her without her consent; that after sexual intercourse he coerced her to perform fellatio; and that after he had ejaculated he threatened to kill her if she told anyone about the incident.

[75] Turning now to the defendant's evidence, he did not impress me as a credible witness. I disbelieve his version of events in Ms X's house. I believe that the defendant lied in evidence and in his ordinary and s 117(3) statements on

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all material issues, in particular, I believe he contrived his evidence that he tried to have sexual intercourse with Ms X but did not penetrate her, that she agreed to fellatio, that he 'just pushed' her on the stomach, and that he did not threaten to kill her if she disclosed to anyone what had happened.

[76] It is true that the defendant was consistent in his evidence and police statements that he did not penetrate Ms X. Nevertheless, I disbelieve him on this issue and prefer the evidence of Ms X that there was penetration.

[77] The defendant was also consistent in his evidence that Ms X was willing to perform fellatio. And he appears to be consistent in his ordinary statement that Ms X 'wanted' to perform fellatio. He testified that he did not use the word 'forced' in answer to question No 16 in his ordinary statement and Insp Hjh Nikmah, who recorded this statement, was never examined on this issue. Nonetheless, I do not believe the defendant's evidence that Ms X was willing to perform fellatio and prefer her evidence that she was forced by him to do so.

[78] On his own admission in evidence the defendant had attempted to have sexual intercourse with Ms X without her consent. I do not believe that the defendant readily gave up his attempt to have sexual intercourse after Ms X offered him fellatio. Nor do I believe that Ms X, who was unwilling to have sexual intercourse, volunteered to perform fellatio.

[79] The defendant was inconsistent in his evidence on a number of issues. For example, the defendant's conduct immediately upon arriving at Ms X's house from his own admission in evidence-in-chief undermines his claim in cross-examination that his purpose for going to her house was to 'meet' her. On his own evidence-in-chief, when Ms X opened the main door he pushed her into the house and once inside proceeded to make sexual advances despite her objections. He certainly had more in mind than just to 'meet' her.

[80] I am satisfied that the defendant went to Ms X's house with the intention of having sexual intercourse with her, that he was not going to accept 'No' for an answer, and that he did have sexual intercourse with her without her consent.

[81] The defendant's evidence that Ms X cried after he ejaculated following fellatio does not make sense. He had given evidence that she cried because he tried to force her to have sexual intercourse and that she offered fellatio instead of sex and he agreed. If indeed Ms X had been willing to perform fellatio it is difficult to understand why she cried after the act. I believe on her evidence that she cried because she did not consent to sexual intercourse or fellatio.

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[82] There are also several discrepancies between the defendant's evidence and his police statements. For instance, the defendant said he only inserted his finger into Ms X's vagina. But there is no mention of this in his police statements. I do not find his explanation that he failed to mention this in his ordinary statement because he was 'in a panic and scared' plausible. He had no difficulty giving a detailed account of what transpired in Ms X's house that afternoon in his ordinary statement. In my opinion he did not mention this act in his police statements because it never occurred at the time and not because he was 'in a panic and scared'.

CONCLUSION

[83] On the evidence in totality I am satisfied the defendant did rape Ms X by having sexual intercourse with her without her consent and she was under the age of 14 years at the material time as charged and convict him accordingly.

Accused convicted as per charge.

Reported by Ashgar Ali Ali Mohamed